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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

GABRIEL SILLS,

Petitioner,

vs.

TIMOTHY E. BUSBY, et al.,

Respondents.

Civil No. 10-cv-2650-H(KSC)

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE RE PETITION FOR WRIT
OF HABEAS CORPUS**

[ECF No. 5]

Gabriel Sills ("Sills"), a state prisoner proceeding pro se and in forma pauperis with a First Amended Petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Petition"), seeks relief from his December 2009 guilty plea in San Diego County Superior Court Case No. SCD205883 and his resulting 18 year sentence. (Pet. filed January 31, 2011, ECF No. 5.) Sills pled guilty to two felony counts of committing lewd and lascivious acts with a child, guilty to a third count of misdemeanor possession or control of child pornography, and agreed to a five-year sentence enhancement for an admitted prior conviction carrying a strike consequence. Although he did not appeal the judgment of conviction, he pursued collateral relief in the state courts at all three levels of review, exhausting his federal claims. (Pet. 2-5, ECF No. 5; Lodgment Nos. 5, 7, 9.)¹ Respondents unsuccessfully moved to dismiss the Petition on untimeliness grounds. (ECF No. 10.) They then filed an Answer opposing

¹ Page numbers for docketed materials cited in this Report and Recommendation refer to those imprinted by the Court's electronic case filing system.

1 any habeas relief, and Sills filed a Traverse. (ECF Nos. 11, 15.) The Court has reviewed the pertinent
 2 portions of the record. For the reasons discussed below, it is recommended that the Petition be
 3 **DENIED**.

4 **I. BACKGROUND**

5 In an April 26, 2008 Amended Felony Complaint ("Complaint"), Sills was charged with four
 6 counts of lewd and lascivious acts on a child under the age of 14 years, in violation of Cal. Penal Code
 7 § 288(a), with special allegations elevating the sentencing range for each of those counts to 25 years
 8 to life in prison, and with 100 separate misdemeanor counts for possession of computer images
 9 depicting persons under the age of 18 years engaged in or simulating sexual conduct, in violation of
 10 Cal. Penal Code § 311.11. (Lodgment No. 1 at 1-8.) That Complaint also identified a March 20, 2000
 11 conviction Sills sustained in Medford, Oregon for sexual abuse, qualifying as a first serious felony and
 12 a strike prior under Cal. Penal Code § 667(a)(1). (*Id.* at 31.)

13 On October 31, 2008, Sills, his attorney, and the Superior Court Judge executed a change of
 14 plea form in which Sills pled guilty to felony counts 1 and 2 and to misdemeanor count 5. (Lodgment
 15 No. 2 at 1.) Among other things on the plea form, Sills checked boxes stating that he was entering his
 16 "plea freely and voluntarily" and acknowledging various specific consequences of his plea. In addition
 17 to giving up enumerated constitutional rights, he gave up his right to appeal "issues related to strike
 18 priors . . . and any sentence stipulated" in the plea agreement. He acknowledged his understanding that
 19 the sentencing judge could consider his "prior criminal history and the entire factual background of
 20 the case, including any unfilled, dismissed or stricken charges or allegations or cases when . . .
 21 imposing sentence." He identified his felony sexual abuse strike prior. He recorded his understanding
 22 that the total agreed sentence was for a "5 year serious prior & strike stip 18 years." (*Id.* at 1-2.) Sills'
 23 statement of the facts underlying his guilty pleas, just above his signature under penalty of perjury,
 24 records: "Did a lewd act on a person under 14 years old 2 times. Possessed computer images
 25 depicting person under 18 years old involving sexual conduct." (*Id.* at 3.)

26 Sills was sentenced to the stipulated 18-year term on December 19, 2008, comprised of: a
 27 midterm of six years on Count One, doubled pursuant to the strike, and an additional five years for the
 28 serious felony prior; the same for Count Two, imposed to run concurrently with the 17-year Count One

1 sentence; and one year for the misdemeanor, designated to be served in county jail but which the court
 2 deemed satisfied by the 366 days of pre-sentence credit owed Sills. (Lodgment No. 4.)

3 The underlying factual background of the criminal charges does not bear on the resolution of
 4 Sills' four Petition claims, all of which challenge only procedural or representational aspects of his
 5 change of plea and sentencing. Sills raised the same four claims in serial petitions for habeas corpus
 6 relief in San Diego County Superior Court, the California Court of Appeal, and the California Supreme
 7 Court. (Lodgment Nos. 5, 7, 9.) His September 17, 2010 habeas petition to the California Supreme
 8 Court resulted in a March 30, 2011 summary denial of his petition without articulated rationale or
 9 citation to authority. (Lodgment No. 14, In re Sills, Case No. S186550.) The February 9, 2010
 10 reasoned decision of the Superior Court denying his petition (In re Sills, Case No. HC19827 (order),
 11 provided in incomplete form as Lodgment No. 6 and in complete form Lodgment No. 15) was
 12 superseded, for federal habeas review purposes, by the April 27, 2010 Court of Appeal order denying
 13 his petition (Lodgment No. 8, In re Sills, Case No. D056997) as the last reasoned state court opinion
 14 to address the federal issues. *See Campbell v. Rice*, 408 F.3d 1166, 1170 (9th Cir. 2005); *see also Ylst*
 15 *v. Nunnemaker*, 501 U.S. 797, 803 (1991) (stating, "Where there has been one reasoned state judgment
 16 rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim
 17 rest upon the same ground").

18 Sills alleges as Petition Ground One his guilty plea is not valid because his admission of the
 19 felony strike prior was purportedly not intelligent. (Pet. 7, ECF No. 5.) He alleges as Ground Two
 20 his sentence is illegal because it was purportedly based on materially false and unreliable information.
 21 (Id. at 9.) He alleges as Ground Three he received ineffective assistance of counsel. (Id. at 10.) He
 22 alleges as Ground Four he was denied access to courts in violation of his constitutional right to a
 23 speedy trial by both "California and Oregon State courts and laws." (Id. at 12.)

24 II. DISCUSSION

25 A. Legal Standards For Federal Habeas Relief

26 A federal court "shall entertain an application for a writ of habeas corpus in behalf of a person
 27 in custody pursuant to the judgment of a State court only on the ground he is in custody in violation
 28 of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West 2006). The

1 Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") controls review of Sills' Petition.
 2 See Lindh v. Murphy, 521 U.S. 320, 322-23 (1997). AEDPA imposes a " 'highly deferential standard
 3 for evaluating state-court rulings,' " requiring "that state-court decisions be given the benefit of the
 4 doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002), *quoting Lindh*, 521 U.S. at 333 n.7.

5 "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court,
 6 subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." Harrington v. Richter, __ U.S. __, 131
 7 S.Ct. 770, 784 (2011). Federal habeas relief is available under the first exception only if the state court
 8 result "was contrary to, or involved an unreasonable application of, clearly established Federal law,
 9 as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[R]eview under
 10 28 U.S.C. § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim
 11 on the merits." Cullen v. Pinholster, __ U.S. __, 131 S.Ct. 1388, 1398 (2011). Relief is available
 12 under the second exception only if the state court result "was based on an unreasonable determination
 13 of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2);
 14 see Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) ("Factual determinations by state courts are
 15 presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision
 16 adjudicated on the merits in a state court and based on a factual determination will not be overturned
 17 on factual grounds unless objectively unreasonable in light of the evidence presented in the state court
 18 proceeding, § 2254(d)(2)"); see also Schriro v. Landrigan, 550 U.S. 465, 473-74 (2007).

19 A decision is "contrary to" clearly established precedents if it "applies a rule that contradicts
 20 the governing law set forth in our cases," or it "confronts a set of facts that are materially
 21 indistinguishable from" a Supreme Court decision but reaches a different result. Early v. Packer, 537
 22 U.S. 3, 8 (2002), *quoting Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (distinguishing the
 23 28 U.S.C. § 2254(d)(1) "contrary to" standard from its "unreasonable application" standard). A state
 24 court decision is an "unreasonable" application of clearly established federal law if the state court
 25 "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular
 26 prisoner's case." Williams, 529 U.S. at 407-08. In order to conclude that a state court's decision
 27 qualifies as an unreasonable application of Supreme Court precedent, the decision "must have been
 28 more than incorrect or erroneous;" it "must have been 'objectively unreasonable.'" Wiggins v. Smith,

1 539 U.S. 510, 520-21 (2003) (citations omitted); see Crosby v. Schwartz, __ F.3d __, 2012 WL
 2 1561032 *3 (9th Cir. (Cal.) May 4, 2012). A petitioner can satisfy the "unreasonable application"
 3 standard "only by showing that 'there was no reasonable basis' for" the state high court's decision."
 4 Harrington, 131 S.Ct. at 786 (a "habeas court must determine what arguments or theories . . . could
 5 have supporte[d] the state court's decision; and then it must ask whether it is possible fairminded
 6 jurists could disagree that those arguments or theories are inconsistent with the holding in a prior
 7 decision of this Court").

8 Federal habeas courts apply AEDPA standards to "the last reasoned decision" by a state court
 9 on the merits of the federal constitutional claims raised by a state prisoner seeking relief from a
 10 conviction or sentence. Campbell, 408 F.3d at 1170; Brown v. Horell, 644 F.3d 969, 978 (9th Cir.
 11 2011); see Ylst, 501 U.S. at 803. In deciding whether relief from an unconstitutional trial error is
 12 warranted, federal reviewing courts apply the standard from Brecht v. Abrahamson, 507 U.S. 619, 623
 13 (1993) "uniformly in all federal habeas corpus cases under § 2254," that is, the error must have had
 14 "a substantial and injurious effect or influence in determining the jury's verdict." Bains v. Cambra, 204
 15 F.3d 964, 977 (9th Cir. 2000); see Fry v. Pliler, 551 U.S. 112, 121-22 (2007).

16 **B. No Evidentiary Hearing Warranted**

17 Sills requests an evidentiary hearing on two issues. (Pet. 1, 11, ECF No. 5.) In particular, he
 18 seeks an evidentiary hearing associated with his Petition Ground Two claim challenging the use of his
 19 prior conviction in the Oregon prosecution to enhance his sentence in the California case:

20 Petitioner asserts the minimal informations [*sic*] submitted by the California
 21 prosecutor violated his due process entitlements of proof beyond a reasonable doubt
 22 to impose a prison prior five year enhancement. Thus, without any Oregon State
 23 sentence conviction of abstract of judgment on prior sentencing conviction, or no
 certified Oregon or any state's prison records, nor any records containing fingerprint
 card or court transcribed documents correctly identifying Petitioner serving or
 sentenced to any prior is an illegal prior basis.^[2]

24 (Pet. 45, ECF No. 5-1.)

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26
 27 ² Sills attaches to his Petition as Exhibit D a December 3, 2009 communication from the Jackson
 County, Oregon sheriff's office to the California Department of Corrections with an attached Bench Warrant
 28 for Sills in its Case No. 992639FE, reciting the attachments as including "a fingerprint card and a booking card
 with his mug shot," and requesting that a hold be placed on him. (Pet. Exh. D 15-17, ECF No. 5-2.)

1 Sills also seeks an evidentiary hearing on his Ground Three sub-claims alleging that his guilty
 2 plea "was the product of IAC" and that he received ineffective assistance of counsel ("IAC") at
 3 sentencing. (Pet. 47, ECF No. 5-1.)

4 The aggregate effect of the sub-claims, A through K, asserted and requested
 5 above is sufficient to satisfy the deficient performance prong of the IAC test. At the
 very least, the Court should grant an evidentiary hearing on this IAC claim.

6 (Pet. 52, ECF No. 5-1.)

7 Leaving aside Sills' erroneous understanding of certain legal principles he relies on to support
 8 the merits of his claims, AEDPA "substantially restricts the district court's discretion to grant an
 9 evidentiary hearing." Baja v. Ducharme, 187 F.3d 1075, 1077 (9th Cir. 1999); Cullen, 131 S.Ct at
 10 1400-01 ("Section 2254(e)(2) imposes a limitation on the discretion of federal habeas courts to take
 11 new evidence in an evidentiary hearing"). "[E]vidence introduced in federal court has no bearing on
 12 § 2254(d)(1) review" to determine whether a claim adjudicated by the state court was contrary to or
 13 involved an unreasonable application of clearly established federal law. Cullen, 131 S.Ct. at 1400.
 14 "If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must
 15 overcome the limitation of § 2254(d)(1) on the record that was before that state court." Id.

16 "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which
 17 a prisoner made insufficient effort to pursue in state proceedings." Williams, 529 U.S. at 437.
 18 AEDPA prescribes the manner in which federal courts deciding state prisoners' habeas petitions must
 19 approach the factual record, providing, in pertinent part: (1) "a determination of a factual issue made
 20 by a State court shall be presumed to be correct," with the "applicant [having] the burden of rebutting
 21 the presumption of correctness by clear and convincing evidence;" and (2) "[i]f the applicant has failed
 22 to develop the factual basis of a claim in State court proceedings, the court shall not hold an
 23 evidentiary hearing on the claim unless the applicant shows that . . . the claim relies on . . . a factual
 24 predicate that could not have been previously discovered through the exercise of due diligence and . . .
 25 the facts underlying the claim would be sufficient to establish by clear and convincing evidence that
 26 but for constitutional error, no reasonable factfinder would have found the applicant guilty of the
 27 underlying offense." 28 U.S.C. § 2254(e)(1), (2).

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1 "Because the deferential standards prescribed by § 2254 control whether to grant habeas relief,
 2 a federal court must take into account those standards in deciding whether an evidentiary hearing is
 3 appropriate." Schriro, 550 U.S. at 474. If a claim subject to 28 U.S.C. § 2254(d)(1) does not satisfy
 4 that provision, it is "unnecessary to reach the question whether § 2254(e)(2) would permit a [federal]
 5 hearing on th[at] claim." Cullen, 131 S.Ct. at 1400, *quoting Williams*, 529 U.S. at 444. "In practical
 6 effect, . . . this means that when the state-court record 'precludes habeas relief' under the limitations
 7 of § 2254(d), a district court is 'not required to hold an evidentiary hearing.'" Id. at 1401, 1399-1400,
 8 n.5, *quoting Schriro*, 550 U.S. at 474.

9 All three levels of collateral review in the state courts adjudicated Sills' Petition claims on the
 10 merits relying on the same record. Sills' showing does not overcome the limitations imposed by 28
 11 U.S.C. § 2254(e) restricting federal habeas review to the evidentiary record that was before those
 12 courts. 28 U.S.C. § 2254(e); *see Cullen*, 131 S.Ct. at 1401, 1399-1400, n.5. For the reasons discussed
 13 below, this Court recommends a finding that Sills is not entitled to federal habeas relief pursuant to
 14 28 U.S.C. § 2254(d). Accordingly, his request for an evidentiary hearing should be **DENIED**. Cullen,
 15 131 S.Ct. at 1401.

16 **C. The State Court Result Comports With Controlling United States Supreme Court**
 17 **Authority And Is Objectively Reasonable, Foreclosing Habeas Relief**

18 The last reasoned state court decision addressing Sills' federal claims is the April 27, 2010
 19 California Court of Appeal's Order denying his habeas petition. The order deciding that petition is
 20 reproduced in the docket of that case, provided as Lodgment No. 8, In re Gabriel Sills, Case No.
 21 D056997 (docket notes, order denying habeas petition). The Court of Appeal first denied Sills' ex
 22 parte motion for an order that he be provided with a transcript of his sentencing hearing and for the
 23 clerk's transcript, on grounds he made that request in the wrong court and, in addition, his time for
 24 appeal had elapsed. Then the Court addressed in turn each of his four claims for collateral relief on
 25 the merits, summarizing the pertinent facts, the legal bases, and its rationale for denying him any
 26 habeas relief. (Id.) For the reasons discussed below, it is recommended that the District Court find
 27 the state court results are objectively reasonable and comport with controlling United States Supreme
 28 Court authority, foreclosing federal habeas relief. 28 U.S.C. § 2254(a).

1 **1. Ground One: Invalid Plea**

2 Sills alleges as Ground One that his guilty plea was not "intelligent," a violation of his federal
3 constitutional rights. (Pet. 7, ECF No. 5.) Guilty pleas are valid under the Fifth Amendment if made
4 voluntarily and intelligently by mentally competent defendants. Brady v. United States, 397 U.S. 742,
5 755-56 (1970) (a guilty plea is voluntary when "entered by one fully aware of the direct consequences"
6 of the plea); Bousley v. United States, 523 U.S. 614, 618 (1998) (a plea is intelligent if the defendant
7 first receives "real notice of the true nature of the charge against him, the first and most universally
8 recognized requirement of due process"). "[A] voluntary and intelligent plea of guilty made by an
9 accused person, who has been advised by competent counsel, may not be collaterally attacked."
10 Bousley, 523 U.S. at 621 (quotation marks and citation omitted). While a federal habeas court "must
11 independently assess the plea agreement's effect" on the defendant's constitutional rights, "the
12 construction of the plea agreement and the concomitant obligations flowing therefrom are, within
13 broad bounds of reasonableness, matters of state law," and federal courts "will not disturb [a state
14 court's] reasonable disposition of those issues." Ricketts v. Adamson, 483 U.S. 1, 7 n.3 (1987); *see*
15 Buckley v. Terhune, 441 F.3d 688, 694 (9th Cir. 2006) (California courts, under Adamson, "are
16 required to construe and interpret plea agreements in accordance with state contract law").

17 "The voluntariness of a [guilty] plea can be determined only by considering all of the relevant
18 circumstances surrounding it." Brady, 397 U.S. at 749. "A conviction after a plea of guilty normally
19 rests on the defendant's own admission in open court that he committed the acts with which he is
20 charged." McMann v. Richardson, 397 U.S. 759, 766 (1970) (the admission may not be compelled,
21 and it must be an intelligent act "done with sufficient awareness of the relevant circumstances and
22 likely consequences" because of the constitutional and evidentiary rights relinquished), *quoting* Brady,
23 307 U.S. at 748. The Brady Court found that defendant's guilty plea was voluntary because it was
24 "entered in open court before a judge obviously sensitive to the requirements of the law with respect
25 to guilty pleas" while defendant had competent counsel, a full opportunity to assess the advantages and
26 disadvantages of a trial as compared to those attending a plea of guilty, and the defendant was
27 subjected to "no threats or promises in face-to-face encounters with authorities." Id. at 755 (internal
28 quotations and citation omitted).

Sills does not challenge the validity of his waivers of any of the specifically-enumerated constitutional rights he gave up by electing to plead guilty: i.e., attorney representation; "a speedy and public trial by jury" of the California charges; confrontation and cross-examination of all witnesses against him; the right to remain silent; and the right to present evidence in his own behalf. (Lodgment No. 2 at 1.) Sills initialed the box next to each of those rights indicating he understood and voluntarily gave each one up. (Id.) Rather, he asserts his guilty plea was unconstitutional because he had not yet been sentenced for the prior Oregon conviction used to enhance his sentence in the California case.

As he asserts:

Petitioner's admission of the prior was not knowing, voluntary, and intelligent, under all circumstances; therefore remand for a trial on the validity of the prior allegation is required:

(1) Relevant facts of record

The information alleged Petitioner had suffered a prior conviction in the State of Oregon in a case that presently has not been sentenced, case number 992639FE has been pending since 8/04/00, on or about, and cannot be used as a prison prior, or for a California second strike without finality.

(2) Petitioner was specifically prosecuted for a second strike, specifically based on the information from Oregon case number 992639FE. A due process and 14th violation [*sic*] that Petitioner was illegally enhanced.

(3) Petitioner was specifically prosecuted on an alleged prison prior conviction, which he has not served in any State prison conviction to be subject to California Penal Code section 667, Subd. [*sic*]. Which is an enhancement for not remaining free of custody for a five-year period or enhancement for the controlling charge.

....

Petitioner Sills cannot knowingly admit he has a final prison prior, or offense of a first California strike without the final Oregon Court adjudication first completed there.

....

Further, Petitioner Sills was not made aware of the penal plea consequences of his admissions, as a five year prison prior application, or the future sentencing and enhancements used in Oregon['s pending sentence or its uses retroactively applied adversely upon Petitioner. Thus, Petitioner did not agree, nor advised of [*sic*] pending collateral consequences of the plea

(Pet. 38-40, ECF No. 5-1.)

Courts addressing plea agreement challenges presume the plea record is correct, and when it is inconsistent with the defendant's claims in any subsequent collateral proceedings asserting the plea was not voluntary, the claimant faces a "formidable barrier" because "solemn declarations in open

1 court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977).
 2 Although neither the state courts addressing Sills' claims nor this Court were provided with any
 3 transcribed record of Sills' change of plea or sentencing hearings, the record does contain the following
 4 material documents: the fully-executed Plea Of Guilty/No Contest - Felony form (Lodgment No. 2);
 5 and a readiness conference minute order memorializing Sills' notification to the court of an intent to
 6 change his plea with the notations he "is advised of his constitutional rights and waives those rights,"
 7 he "is sworn and examined," he "withdraws his previously entered plea of not guilty," he "enters a plea
 8 of guilty" to the charges in Count 1, Count 2, and Count 5, he "**admits** the following prior(s): 1 Serous
 9 Felony Prior per PC 667(a); 1 Strike Prior per PC 667(b)-(i)/PC 1170.12", and he "tenders a Harvey
 10 waiver" and "tenders an Arbuckle waiver." (Lodgment No. 3.) A December 22, 2008 Abstract Of
 11 Judgment noted his sentencing hearing occurred on December 19, 2008. (Lodgment No. 4). Thus,
 12 the record memorializes that Sills appeared in open court and was examined by a trial judge under oath
 13 before the court accepted his guilty pleas to two of the felony charges and to one of the misdemeanor
 14 charges, obtained his admission of the prior serious/strike felony conviction in Oregon, and confirmed
 15 his California sentence consequently would be calculated as a second strike case also carrying a five-
 16 year enhancement for that prior conviction, consistent with the change of plea form. (Lodgment
 17 No. 3.) Sills received the bargained-for 18 year sentence.

18 Sills relies on Boykin v. Alabama, 395 U.S. 238 (1969) as support for his argument that his
 19 "admission of the prior was no[t] knowing, voluntary, and intelligent under all circumstances; therefore
 20 remand for a trial on the validity of [the] prior allegation is required." (Pet. 7, ECF No. 5.) "A plea of
 21 guilty is more than a confession which admits that the accused did various acts; it is itself a conviction;
 22 nothing remains but to give judgment and determine punishment." Boykin, 395 U.S. at 242 (holding
 23 "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without
 24 an affirmative showing that it was intelligent and voluntary"). "Admissibility of a confession must be
 25 based on a 'reliable determination on the voluntariness issue which satisfies the constitutional rights
 26 of the defendant.' " Id. (citation omitted).

27 However, the Boykin authority is factually distinguishable from Sills' circumstances. The
 28 Boykin Court found reversible error in that defendant's robbery convictions and death sentence based

1 on a record which did not satisfy federal standards requiring an affirmative showing that the
 2 defendant's guilty plea was voluntary and intelligent. That defendant had pled guilty at his
 3 arraignment, there was no indication the judge asked the defendant any questions concerning his plea,
 4 and the defendant did not address the court. Id. at 239. At a subsequent penalty phase trial, the
 5 defendant's attorney "engaged in cursory cross-examination, petitioner neither testified himself nor
 6 presented testimony concerning his character and background, . . . [t]here was nothing to indicate that
 7 he had a prior criminal record," and the trial court stressed to the jury that the defendant had pled guilty
 8 to the five charged robberies by violence or causing fear, each carrying a potential sentence in the
 9 range of a ten-year prison term to death. Id. at 240. The jury returned a death sentence on each count.

10 The Boykin facts and circumstances bear no resemblance to Sills'. Sills changed his plea to
 11 guilty after engaging in plea bargaining. In exchange for his guilty plea to two felonies and one
 12 misdemeanor from the scores of charges in the complaint, the government dropped two of the four
 13 felony lewd and lascivious conduct charges as well as about 100 additional misdemeanor counts for
 14 possession of child pornography. (*See* Lodgment Nos. 1-3.) Sills was represented by counsel before,
 15 during, and after his change of plea. The California Court of Appeal disposed of this claim in an
 16 objectively reasonable manner based on the record presented:

17 Sills contends that his guilty plea was not intelligently made. His argument rests
 18 exclusively on the presumption, which we have already rejected, that the prior Oregon
 19 conviction was insufficient to support the enhancements under Penal Code sections
 20 667, subdivision (a)(1) and 667, subdivisions (b)-(i). Considering the significant
 21 potential penalties, Sills' plea seems to be an intelligent alternative, and Sills offers no
 22 other explanation to support his claim that his waiver of his right to trial was not
 23 knowing and intelligent. Petitioner bears the burden of stating a prima facie case for
 24 relief; otherwise, the court will summarily deny the petition. (*People v. Duvall* (1995)
 25 9 Cal.4th 464, 474-475.) Sills has not stated a prima facie case for relief.

26 (Lodgment No. 8.)

27 Sills' categorical contention that he "was not made aware of the penal plea consequences of his
 28 admissions, as a five year prior felony application" (Pet. 8, ECF No. 5) is belied by the plea agreement
 form item 2 he initialed, expressly identifying a "5 year serious prior" as a component of the stipulated
 18 year sentence (Lodgment No. 2 at 1), and by the minutes of his change of plea hearing
 memorializing his admission under oath that he had one serious felony and strike prior as defined in
 the cited California Penal Code sections pursuant to which he was to receive that stipulated five-year

1 sentencing enhancement (Lodgment No. 3). In addition, as found by the state courts, Sills' argument
 2 is predicated on an erroneous construction of the term "conviction" for purposes of prior strike
 3 enhancements under California law. *See* Section II.C.2, below.

4 The record supports the objective reasonableness of the state court's determination on the
 5 merits that Sills' plea was constitutionally valid. He identifies no basis in the record from which this
 6 Court, applying the requisite AEDPA deference, could conclude the state court result constitutes an
 7 unreasonable determination of the facts, nor does he identify any legal authority from which this Court
 8 could conclude the result was contrary to or an unreasonable application of controlling federal law.
 9 28 U.S.C. § 2254(d). It is therefore recommended relief on Ground One be **DENIED**.

10 **2. Ground Two: Illegal Sentence Using Oregon Prior Conviction**

11 Sills relies on the inapposite case of Burgett v. Texas, 389 U.S. 109 (1967) to support his
 12 argument he received an "enhanced sentence based on materially false and unreliable information."
 13 (Pet. 9, ECF No. 5.) The Burgett Court reversed a Texas conviction for assault with intent to murder
 14 because allegations that the defendant had suffered three prior felony convictions for forgery in
 15 Tennessee that were used to enhance his punishment for the Texas crimes were not supported in the
 16 certified records of the Tennessee convictions with a showing the defendant was represented by
 17 counsel or waived counsel in those cases. That defect raised a presumption that he was denied his
 18 right to counsel in violation of the Sixth Amendment, and the Tennessee convictions should therefore
 19 have been deemed void in the subsequent Texas prosecution. Sills alleges no such constitutional
 20 defect associated with his Oregon conviction. Rather, he contends that the Oregon criminal
 21 proceedings were not complete, and therefore he had not yet been convicted of the felony used to
 22 enhance his California sentence.

23 Respondents succinctly extract from Sills' Petition statement of Ground Two the three
 24 components of the claim: "1) the use of his Oregon prior conviction prior to final sentencing was
 25 illegal; 2) the use of his Oregon prior conviction as a strike before permitting the Oregon court to
 26 specify a lesser conviction was illegal; and 3) the plea agreement did not inform him his prior Oregon
 27 conviction could be used as a strike. . . ." (Answer 2, ECF No. 11.) Sills' contention his plea
 28 agreement did not inform him his prior Oregon conviction could be used as a strike under California

1 sentencing law is a facially inaccurate description of the record described above. His other two
 2 arguments in support of Ground Two have no merit. The California Court of Appeal disposed of this
 3 claim in an objectively reasonable manner:

4 In 2000, Sills was convicted in Jackson County, Oregon, of public indecency and
 5 sexual abuse in the first degree. He failed to appear at his sentencing hearing; a bench
 6 warrant for his arrest was issued and remains outstanding. In 2008 Sills pleaded guilty
 7 to two counts of Penal Code section 288, subdivision (a) (lewd or lascivious acts on a
 8 child under the age of 14) and admitted a five-year enhancement allegation under Penal
 9 Code section 667, subdivision (a)(1), and a prior strike conviction allegation under
 10 Penal Code section 667, subdivision (b)-(i), and was sentenced to a term of 17 years
 11 in prison. Now Sills contends that his sentence was illegally enhanced using an
 12 unconstitutional prior conviction, the 2000 Oregon conviction. Sills does not dispute
 the existence of that conviction. Rather, he argues that, because he was never
 sentenced under that conviction, it cannot serve as a prior strike conviction to double
 his sentence or as a Penal Code section 667, subdivision (a), five-year enhancement.
 Neither the five-year enhancement under Penal Code section 667,
 subdivision (a)(1), nor the prior strike enhancement under Penal Code section 667,
 subdivisions (b)-(i), requires prior prison time. Rather, those code sections impose
 enhancements for each prior conviction. Consequently, the enhancements were
 appropriate, and Sills is not entitled to relief on this claim.

13 (Lodgment No. 8.)

14 As in his Ground One claim, Sills relies on an erroneous definition of "conviction." At the time
 15 of his plea and sentencing in California, he argues his Oregon conviction remained an "open" case.
 16 He admits that a jury had convicted him of one of the four charges in the Oregon prosecution, that he
 17 had pled guilty to the second of those charges, that the third charge had been dismissed, but that the
 18 fourth charge was yet to be tried, and the Oregon court had not yet imposed a prison sentence.

19 Petitioner's Oregon case began in June 1999, trial in June 2000. Before trial started,
 20 he pled guilty to count-2 of a four count indictment, count-3 was dismissed. After trial,
 21 the jury found him guilty of count-1, count-4 remained pending a *[sic]* separate trial.
 22 Petitioner absented himself from the sentencing and further trial proceedings in the
 search to locate witnesses that the Oregon court denied a continuance of time to locate.
 . . . Petitioner was subsequently charged, April 2006, in California, and is currently
 serving a 18 year sentence there.

23 (Pet. 12, ECF No. 5.)

24 Sills ensured through his own conduct that he would evade sentencing on the completed
 25 Oregon prosecutions by absconding from the state.

26 Petitioner was present at the commencement of his jury trial, but absented
 27 himself from the sentencing proceedings in the search to locate witnesses that the
 28 Oregon Court denied a continuance of time to locate. The witnesses would have
 provided exculpatory testimony and evidence to his innocence.

1 (Pet. 43, ECF No. 5-1.)

2 In his Traverse, Sills admits:

3 (1) Petitioner Sills did have a violation of law indictment filed 6/10/99. In the Circuit
4 Court of the State of Oregon for Jackson County, case name: State of Oregon v.
Gabriel David Sills, case no. 09-2639-FE.

5 (2) Petitioner Sills went to trial in the above reference case on 6/6-8/2000. A
6 sentencing date was scheduled for the above case on 8/4/2000 which Petitioner
absented himself from, and a arrest warrant was issued on 8/4/2000. (The above facts
7 were in Oregon).

8 (Traverse 10, ECF No. 15.)

9 Sills argues from those facts that he had not actually suffered a prior "conviction" in the
10 Oregon case, despite acknowledging on his plea form and at his change of plea hearing that he had a
11 conviction in Oregon that was going to be used to enhance his California sentence. Although he casts
12 Ground Two as an "unconstitutional sentence" claim, the gist of the claim is rooted in state law, in
13 particular the construction of what constitutes a "conviction." He attempts to bootstrap his willful
14 avoidance of the consequences of his Oregon conviction by arguing the prosecution of that case is
15 consequently incomplete. He thus appears to confuse "conviction" (that is, "[t]he act or process of
16 judicially finding someone guilty of a crime; the state of having been proved guilty," Black's Law
17 Dictionary 384 (9th ed. 2009)) with "judgment" (that is, "[a] court's final determination of the rights
18 and obligations of the parties to a case," disposing of all issues in controversy (*id.* 918)). Under
19 California criminal law, a "conviction" for purposes of the state's three strikes provisions means the
20 factual determination of guilt by verdict or plea. (*See* Lodgment No. 15, slip op. at 3-5.) In rejecting
21 this claim, the California courts construed the state's three strikes law as encompassing Sills'
22 circumstances. (*See* Lodgment No. 15 slip op. at 4-5 (demonstrating the state's construction "of what
23 constitutes a strike and/or a prior").) Federal habeas courts may not "reexamine state-court
24 determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 68 (1991); Jackson v. Ylst,
25 921 F.2d 882, 885 (9th Cir. 1990) (federal courts "have no authority to review a state's application of
26 its own laws").

27 Sills also argues that the three strikes law is unconstitutional as applied to him on "ex post
28 facto" grounds. (Pet. 9, ECF No. 5.) He contends he received an "ex post facto" aggravation of his

1 sentence because the Oregon sexual abuse conviction used to enhance his California sentence was "not
 2 final or sentenced," he did not receive notice of the "retro-active additional punishment to pending
 3 Oregon case # 992638FE, nor to the use of unadjudicated final conviction in Oregon with sentencing
 4 factors for basis as aggravating enhancements by California to impose a second strike or five year
 5 enhancements." (*Id.*) He speculates the California conviction may adversely affect his ultimate
 6 Oregon sentence, another purported ex post facto defect. However, he identifies no controlling United
 7 States Supreme Court authority that would permit this Court to "reverse or remand [this matter] for
 8 resentencing of his convictions" (Traverse 11, ECF No. 15) in the California case on those grounds,
 9 nor any authority for this Court to involve itself with the Oregon matter through this Petition.

10 Sills' Petition also references the Eighth Amendment in connection with his challenge to the
 11 length of his sentence for the California offenses. (Pet 9, ECF No. 5.) However, the Supreme Court
 12 has emphasized that a term of years sentence violates the constitution only in extraordinary
 13 circumstances exhibiting "gross disproportionality." Lockyer v. Andrade, 538 U.S. 63, 77 (2003)
 14 (upholding a California three-strikes sentence of 25 years to life for two petty theft convictions as not
 15 "contrary to" nor an "unreasonable application" of clearly established United States Supreme Court
 16 decisions applying the gross disproportionality principle); *see Crosby*, 1012 WL 1561032 at *7
 17 (discussing the Ninth Circuit's application of the Supreme Court's "nebulous gross disproportionality
 18 test in a number of habeas cases challenging convictions under California's Three Strikes Law"). Sills
 19 cites no pertinent authority to support his inferred characterization of his 17-year sentence for two
 20 counts of felony sexual abuse of a minor as "grossly disproportionate" to the crimes, particularly when
 21 the plea bargain he accepted to arrive at that term of years relieved him of answering for multiple
 22 additional charged counts exposing him to a much longer sentence.

23 Finally, Sills supports his additional summary contention that "California's three strikes law
 24 is unconstitutional" (Pet. 9, ECF No. 5) with no substantiating federal authority. The argument is
 25 without merit. A prior conviction can constitutionally be used to increase the penalty for a crime
 26 beyond the statutory maximum without the need to submit that fact to a jury for proof beyond a
 27 reasonable doubt. Cunningham v. California, 549 U.S. 270, 288-89 (2007) (holding California's
 28 determinate sentencing law ("DSL") at that time, authorizing a judge rather than a jury to find facts

1 by a preponderance of the evidence exposing a defendant to an elevated upper term sentence, violated
 2 a defendant's right to trial by jury, "except for the fact of a prior conviction," which may be used
 3 constitutionally to increase the penalty for a crime beyond the prescribed statutory maximum); *see*
 4 Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Sills was sentenced after California's DSL was
 5 amended in response to Cunningham, and he received the presumptive maximum middle-term
 6 sentence of 6 years for each of the felony convictions predicated on his guilty plea convictions. Each
 7 sentence was doubled by operation of the three strikes law, and the five-year enhancement was also
 8 based solely on his prior Oregon conviction. The imposition of sentencing enhancements for recidivist
 9 criminal offenders predicated on prior felony convictions, as occurred in Sills' case, is not contrary to
 10 United States Supreme Court precedent on that point.

11 According the requisite deference to the state court results, it is recommended the Court find
 12 that Sills' custody comports with controlling federal authority, and that the state courts reached
 13 objectively reasonable factual findings in upholding his conviction and sentence. 28 U.S.C. § 2254(d);
 14 *see Harrington*, 131 S.Ct. at 785-86. Relief on Ground Two should be **DENIED**.

15 3. Ground Three: Ineffective Assistance Of Counsel

16 Sills alleges he received ineffective assistance of counsel ("IAC") associated with his change
 17 of plea and at sentencing. (Pet. 10, ECF No. 5.) The California Court of Appeal disposed of this claim
 18 in an objectively reasonable manner:

19 Sills also argues he was deprived of effective assistance of counsel in connection with
 20 his plea bargain. "[A] defendant claiming ineffective assistance of counsel under the
 21 federal or state Constitution must show both deficient performance under an objective
 22 standard of professional reasonableness and prejudice under a test of reasonable
 23 probability of a different outcome." (People v. Ochoa (1998) 19 Cal.4th 353, 445;
 accord Strickland v. Washington (1984) 466 U.S. 668, 687). Sills has demonstrated
 neither that his counsel's performance was deficient, nor that he would have obtained
 a better outcome had he not accepted the plea bargain. To the contrary, Sills admits he
 faced a significantly longer sentence than he obtained under the plea (up to 106 years).

24 (Lodgment No. 8.)

25 When an alleged ineffective assistance of counsel claim implicates the voluntariness of a guilty
 26 plea, a federal constitutional claim is stated. *See Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985).
 27 Nevertheless, judicial scrutiny of counsel's performance is always "highly deferential." Strickland v.
 28 Washington, 466 U.S. 668, 689 (1984). Courts approach an IAC analysis with the "strong

1 presumption" that counsel "rendered adequate assistance and made all significant decisions in the
 2 exercise of reasonable professional judgment." Cullen, 131 S.Ct. at 1403 ("We take a 'highly
 3 deferential' look at counsel's performance . . . through the 'deferential lens of § 2254(d)' ") (citation
 4 omitted); see Harrington, 131 S.Ct. at 788, 791-92 (reversing a Ninth Circuit en banc grant of habeas
 5 relief on an IAC claim for lack of sufficient deference to the state court result: "The standards created
 6 by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review
 7 is 'doubly' so") (citations omitted). "[I]t is not enough to convince a federal habeas court that, in its
 8 independent judgment, the state-court decision applied *Strickland* incorrectly," but rather the petitioner
 9 "must show that the [state court] applied *Strickland* to the facts of his case in an objectively
 10 unreasonable manner." Bell v. Cone, 535 U.S. 685, 699 (2002); see Harrington, 131 S.Ct. at 786
 11 ("[E]ven a strong case for relief does not mean the state court's contrary conclusion was
 12 unreasonable").

13 To prove ineffective assistance of counsel, the IAC claimant must establish both counsel's
 14 unreasonable performance and resulting prejudice. Strickland, 466 U.S. at 690, 694. To demonstrate
 15 constitutional error, "[t]he challenger's burden is to show 'that counsel made errors so serious that
 16 counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' "
 17 Harrington, 131 S.Ct. at 787, quoting Strickland, 466 U.S. at 687. To demonstrate prejudice, the
 18 petitioner must show that "but for counsel's unprofessional errors," there is a reasonable probability
 19 "the result of the proceeding would have been different." Strickland, 466 U.S. at 690. "A reasonable
 20 probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see
 21 Harrington, 131 S.Ct. at 792 ("The likelihood of a different result must be substantial, not just
 22 conceivable"). "Federal habeas courts must guard against the danger of equating unreasonableness
 23 under *Strickland* with unreasonableness under § 2254(d)." Harrington, 131 S.Ct. at 788 ("[T]he
 24 question is not whether counsel's actions were reasonable," but rather "whether there is any reasonable
 25 argument that counsel satisfied *Strickland's* deferential standard"). "A court considering a claim of
 26 ineffective assistance must apply a 'strong presumption' that counsel's representation was within the
 27 'wide range' of reasonable professional assistance." Id. at 787, quoting Strickland, 466 U.S. at 688.

28 Sills identifies no factual basis from the record for a finding his attorneys rendered

1 constitutionally deficient representation in obtaining a plea bargain that substantially reduced Sills'
 2 exposure to a significantly longer prison term and that was honored at his sentencing. The failure of
 3 the deficient performance prong of the Strickland test obviates the need to analyze the prejudice prong,
 4 as both are required before a petitioner can prevail on an IAC theory. In any event, Sills attempts no
 5 demonstration that could remotely support a conclusion that "but for" counsel's performance, he would
 6 have obtained a better outcome, either concerning the plea agreement or at sentencing. Applying the
 7 "doubly deferential" standards of Strickland and of 28 U.S.C. § 2254 review to this record, it is
 8 recommended relief on Ground Three be **DENIED**.

9 **4. Ground Four: Access To Courts Denied By Speedy Trial Right Violation**

10 Sills asks this Court to dismiss the charges in the Jackson County, Oregon case because "the
 11 length of delay to appear in court is violation [*sic*] of speedy trial guarantee," a denial of access he
 12 attributes to both "California and Oregon courts and laws." (Pet. 12, ECF No. 5.) That requested relief
 13 is beyond the scope of federal habeas relief available through a petition challenging a prisoner's
 14 California custody for California convictions.

15 Sills alleges in Ground Four that California and Oregon authorities obstructed his extradition
 16 back to Oregon after he was detained for the California crimes, allegedly causing violations of his
 17 constitutional rights to access to the courts and to a "speedy trial" because the upshot was a delay in
 18 a final disposition of the Oregon case. (Traverse 10-11, ECF No. 15; *see* Pet. 12, ECF No. 5.)

19 Petitioner asserts upon his incarceration period while at the San Diego County Jail, []
 20 he received information while his trial was pending, that the Oregon defense witnesses
 21 were finally located and voluntarily able to testify to exculpatory testimony previously
 22 unavailable to Petitioner. The Oregon witnesses and previously unavailable evidence
 23 exculpatory to Petitioner's trial are not available. Although, now Cal. Dept. of Corr.
 24 refuse to provide extradition to Oregon jurisdiction.

25 (Pet. 53-54, ECF No. 5-1.)

26 Sills contends he tried to have himself transported back to Jackson County, Oregon under the
 27 Interstate Agreement on Detainers ("IAD"), representing he "was transported to Jackson County,
 28 Oregon arriving on or about 5-17-2010," a delay of six years since his 2000 conviction. He alleges the
 delay violated not only "the 180 day time provision of the IAD" but also "has violated his right to a
 fair and speedy trial and sentencing" in the Oregon courts. (Pet. 12, ECF No. 5.) Of course, the record

1 reflects the delay in obtaining a final judgment in the Oregon case was caused by Sill's own willful
 2 fugitive status until his arrest in California, as described above and as summarized in the probation
 3 report prepared for his December 2008 sentencing in San Diego County Superior Court. (*See*
 4 Lodgment No. 15, slip op. at 4.) The California Court of Appeal disposed of this claim in an
 5 objectively reasonable manner that comports with federal authority.

6 Finally, Sills contends he was deprived of access to Oregon courts because of his
 7 California conviction. He claims the California Department of Corrections and
 8 Rehabilitation (CDCR) failed to process his requests to return to Oregon for
 9 sentencing, violating his right to a speedy trial and the Interstate Agreement on
 10 Detainers. Again, Sills has not stated a prima facie case for relief. In response to his
 11 requests to be transported to Oregon, CDCR consistently has instructed Sills to seek
 12 relief from the appropriate authority in Oregon. Under these circumstances, there is no
 13 showing Sills is entitled to relief from California courts. We do not address petitioner's
 14 challenge to the superior court's order denying his petition in that court. (*In re Clark*
 15 (1993) 5 Cal.4th 750, 767, fn. 7.) The petition is denied.

16 (Lodgment No. 8.)

17 Sills identifies no basis from which this Court could find warranted the application of the 28
 18 U.S.C. § 2254(d) exception to the AEDPA prohibition against a federal habeas court "relitigating...
 19 any claim 'adjudicated on the merits' in state court." *Harrington*, 131 S.Ct. at 784.

20 For all the foregoing reasons, it is recommended the Court find the state court result denying
 21 Sills relief on his four federal constitutional claims comports with controlling United States Supreme
 22 Court authority and reaches objectively reasonable factual determinations from the record presented.
 23 AEDPA accordingly does not permit this Court to disturb that result. The Court should **DENY** the
 24 Petition in its entirety, as Sills is not in custody in violation of federal law. 28 U.S.C. § 2254(a).

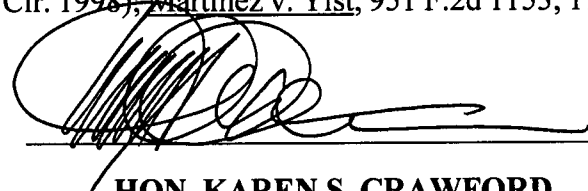
25 **III. CONCLUSION AND RECOMMENDATION**

26 The Court submits this Report and Recommendation to United States District Judge Marilyn
 27 L. Huff under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for
 28 the Southern District of California. For all the foregoing reasons, **IT IS HEREBY**
RECOMMENDED this habeas Petition be **DENIED** in its entirety on grounds the Petitioner is in
 custody in violation of no federal right from the record presented. **IT IS FURTHER**
RECOMMENDED the Court issue an Order (1) approving and adopting this Report and
 Recommendation and (2) directing that judgment be entered denying the Petition.

1 **IT IS HEREBY ORDERED** no later than **June 29, 2012**, any party to this action may file
2 written objections with the Court and serve a copy on all parties. The document should be captioned
3 "Objections to Report and Recommendation."

4 **IT IS FURTHER ORDERED** any Reply to the Objections shall be filed with the Court and
5 served on all parties no later than **July 6, 2012**. The parties are advised that failure to file objections
6 within the specified time may waive the right to raise those objections on appeal of the Court's Order.
7 See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1157 (9th
8 Cir. 1991).

9 **DATED:** 6/15, 2012



HON. KAREN S. CRAWFORD
UNITED STATES MAGISTRATE JUDGE